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No. 86-1064

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

MARIO M. CUOMO, Governor of the State of New York, and THOMAS A. COUGHLIN III, Commissioner of the New York State Department of Correctional Services,

Petitioners,

vs.

RICHARD J. KOEHLER, Commissioner of the New York City Department of Correction; HARVEY PIERCE, JR., Warden, New York City House of Detention for Men; D. MICHAEL PEPE, CLAYTON JEMMOTT AND JOHN KIERNON, Deputy Wardens, New York City House of Detention for Men; and EDWARD I. KOCH, Mayor of the City of New York, individually and in their official capacities,

City-Respondents,

and

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA, AND ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Inmate-Respondents.

INMATE-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 12, 1987

QUESTION PRESENTED

Did the District Court have jurisdiction to join State officials (herein Petitioners) as third-party defendants to order relief against them when it was claimed by New York City defendants (herein City-Respondents) that the failure of the State officials to transfer state-sentenced prisoners to state prison from city jails was interfering with the City's ability to fulfill its obligations under the District Court's orders that established the constitutional rights of the plaintiff class (herein Inmate-Respondents) to be free from overcrowded and otherwise unconstitutional jail conditions?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited in the Petition for Certiorari (Petition at p. 3), this case also involves the following constitutional and statutory provisions. United States Constitution, Amendment XIV; The Civil Rights Act of 1871, 42 U.S.C. § 1983; and 28 U.S.C. §§ 1343(3) and (4).

STATEMENT OF THE CASE

On June 24, 1975 Inmate-Respondents, pretrial detainees at the House of Detention for Men on Rikers Island (HDM) filed this lawsuit against New York City officials responsible for the operation of HDM. The action challenged as unconstitutional a broad range of conditions of confinement under which Inmate-Respondents were housed. In the early stages of the case a number of conditions and practices at HDM were found by the District Court (Lasker, J.) to be unconstitutional. Among these were the double-celling of detainees in cells designed for one-person occupancy. See e.g., Orders of November 18, 1975 and May 10, 1976 (4-5).[1] A plenary trial in this case began in October, 1976 and was concluded in the Spring of 1977. Voluminous post-trial briefs were submitted to District Court by the Winter of 1977 (7).

Following Mayor Edward Koch's assumption of office in January, 1978 the City-Respondents indicated their willingness to enter into negotiations to resolve the outstanding issues in this and in other conditions of confinement litigation brought by pretrial detainees in the New York City jails. The parties therefore requested that the District Court withhold determination of the issues which had been tried before it.

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[1]Unless otherwise indicated, numbers in parentheses preceded by a letter refer to the Appendix to the Petition for Certiorari. All other references in parentheses are to pages of the Joint Appendix submitted to the Second Circuit Court of Appeals.

In November, 1979 a broad settlement was reached between the Inmate-Respondents and the City-Respondents in this case as well as in the other conditions of confinement litigation directed at the City's other pretrial detention facilities. This settlement resolved constitutional claims regarding numerous institutional conditions, including inadequate food service, unsanitary conditions, inadequate access to legal materials and excessive cell confinement. On March 30, 1979 the District Court approved the "Stipulation For Entry of A Partial Final Judgment" and a Partial Final Judgment By Consent was entered on April 2, 1979 (8). In the other five cases brought on behalf of pretrial detainees in New York City, similar orders were entered by other district judges in March and April, 1979, approving and entering as Partial Final Judgments By Consent ["the Consent Judgments"] stipulations between counsel for the Inmate-Respondents and counsel for the City-Respondents. Thereafter, in the interest of uniformity and judicial economy, these Consent Judgments were transferred to Judge Lasker for enforcement purposes.

In September, 1979, the Inmate-Respondents and the City-Respondents in the instant case entered into a further "Stipulation For Entry Of An Order," the purpose of which was "to secure plaintiffs' rights to be housed under constitutional conditions." The Stipulation specifically addressed the major issues in the case that centered on the antiquated structure of HDM, its inaccessibility to attorneys and families, and its overpopulation. This Stipulation provided, inter alia, that the trial record established that "the housing blocks at HDM and the

institution at large were overpopulated; such overpopulation resulted in an atmosphere of tension and hostility, a strain on all of the institution's facilities, and interference with supervision, protection and provision of services to members of the plaintiff class." Benjamin v. Malcolm, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980) (reciting Stipulation). The Stipulation provided further that Inmate-Respondents were entitled to the entry of a judgment remedying the unconstitutional conditions at HDM, and that Inmate-Respondents would have the opportunity to litigate what the appropriate remedy would be. Id.

Because the City-Respondents failed to reduce the number of inmates at HDM, Inmate-Respondents moved in July, 1980 for an Order granting relief from unconstitutional overcrowding at HDM and specifically asked the District Court to reduce the population at the detention facility to 1000. By decision dated August 27, 1980 the District Court found that "the record establishes that confinement of inmates at HDM has been conducted in such a manner over an extended period as to cause them genuine privation and hardship; it is stipulated that such confinement was unconstitutional in September 1979, and we have found that the condition of unconstitutionality has not been removed." 495 F. Supp. at 1364-5. The District Court then granted Inmate-Respondents' motion to the extent of ordering the reduction of the population at HDM to 1200.[2]

[2]The record in the case which the District Court relied on in imposing a population cap of 1200 inmates at HDM included "a long history of studies of HDM by public and quasi-public bodies all of which have concluded that HDM has been dangerously overcrowded for years and have recommended that its population be stringently reduced." 495 F. Supp. at 1360.

In August, 1980 while the motion to reduce the population at HDM was being considered by the District Court, the City-Respondents filed a motion for an order joining the Governor of New York and the State Commissioner of the Department of Correctional Services, Petitioners here, as necessary party defendants. The City-Respondents argued that the presence of state-ready[3] inmates at HDM frustrated the City's ability to control the population at HDM. In its decision dated November 19, 1980 the District Court denied the motion to join the Petitioners without prejudice to its renewal by the City-Respondents if the state-ready problem could not be resolved on the basis of negotiation, as it apparently had been while the motion was pending. Benjamin v. Malcolm, 88 F.R.D. 333, 335 (S.D.N.Y. 1980).

In July, 1981 the Inmate-Respondents filed a motion seeking to hold City-Respondents in contempt and the appointment of an independent monitor because of substantial and systemic violations of the Consent Judgments. This motion was supported by expert affidavits, over six hundred inmate declarations, and the City-Respondents' own documents and admissions.

In their response to the contempt motion, the City-Respondents did not deny the vast majority of violations documented by the Inmate-Respondents. As a result of negotiations between the Inmate-Respondents and City-Respondents, an agreement was reached on the appointment of

[3]A state-ready inmate is one who has been convicted of a felony, and sentenced to a term of more than one year in the custody of the State Department of Correctional Services and for whom necessary documents for transfer to state custody have been completed. N.Y. Criminal Procedure Law § 430.20 and New York Correction Law § 601.

a "neutral compliance consultant," which led to the District Court's approval of a stipulation and entry of an order on June 18, 1982, establishing an Office of Compliance Consultants ("OCC"). The compliance consultant was charged with, and has been since September, 1982, assessing the City-Respondents' compliance with the requirements of the Consent Judgments, responding to allegations of non-compliance, making recommendations as to appropriate remedial action, and attempting to resolve informally disputes between the parties. Since its inception, OCC has observed in virtually all of its reports to the District Court that progress towards resolving issues and achieving compliance has been halting; indeed, with respect to every provision of the Consent Judgments OCC has addressed, the City-Respondents have been found to be in violation of the District Court's orders.

In March, 1981 Inmate-Respondents moved by order to show cause for preliminary relief from unconstitutional overcrowding at HDM and its annex facilities, C-71 and C-95.[4] Inmate-Respondents alleged, and the District Court found, that dormitories in the HDM annexes had become overcrowded and that this overcrowding was contributing to violations of the Consent Judgments, among other prior orders of the District Court. In April and August, 1981 Inmate-Respondents and the City-Respondents entered into two stipulations, both of which were approved for entry as

[4]These annexes had become enormous institutions themselves, although they continued to share service facilities located in the main HDM building. Inmate-Respondents alleged, and the City-Respondents did not challenge, that, due to overcrowding, inmates in these facilities were being forced to sleep in dayrooms and receiving rooms.

orders by the District Court, and which required, inter alia, that the City-Respondents cease housing members of the plaintiff class in non-housing areas, establish separate service facilities in HDM and the annex facilities, and impose a cap on the populations in the dormitories in these buildings.

In June, 1981 the City-Respondents renewed their motion to join the Governor of New York and the State Commissioner of Correctional Services, Petitioners, based on an increase in the number of state-ready inmates in the City jails. In July, the District Court held a hearing and took testimony from the Commissioners and subordinate officials of both the City and State departments of correction. In a bench decision, and in a written decision one month later, the District Court ordered the Petitioners joined in the litigation and to accept within a reasonable time, upon completion of the transfer processing, each person housed at HDM who was sentenced to a prison term in a state correctional facility.[5] This Order was based upon the allegation, unchallenged by the Petitioners, that their failure to remove state-ready inmates from the City jails prevented the City-Respondents from meeting their

[5]The City-Respondents and Petitioners subsequently agreed that state-ready inmates could be taken from New York City within 48 hours of completion of their transfer processing--the time period in the Court's Order of July 16, 1981. (F-7-8). Transfer processing normally takes between five and ten days to be completed. (F-7). When these processing days are added to the 48 hour time limit in the District Court's order, the total amount of time that should elapse between actual sentencing and transfer is approximately twelve days. Thus, claims by Petitioners that the time for transfer set by the District Court is arbitrary or in conflict with state court decisions providing a total of fourteen days between sentencing and transfer are wrong at best and at worst, a distortion of the record. See Petition at 5, 8, 15, 18, and 22.

obligations under the District Court's August, 1980 Order limiting the population at HDM and the April and June, 1981 orders enjoining use of non-housing areas and placing limits on dormitory population. A second basis for the order was the Petitioner's obligation, set out in § 430.20 of the New York Criminal Procedure Law, to remove "forthwith" from local jails persons sentenced to imprisonment in State institutions. Benjamin v. Malcolm, 528 F. Supp. 925 (S.D.N.Y. 1981).

In December 1981 the Petitioners moved for a temporary modification of the August, 1981 Order which required them to remove state-readies from the City jails. The Petitioners argued that the City-Respondents had sufficient bed space to house state-readies through March, 1982 but the District Court found that:

> the only vacant cells which exist at HDM are those which had to be vacated in order to render conditions at HDM permissible.... Moreover, if vacated space were to be made available to state readies, service facilities for food, sanitation, programs, guards, etc. could be strained beyond the limits of the currently fragile balance.

528 F. Supp. at 930.

The District Court denied the Petitioners' motion to modify and characterized the thrust of the Petitioners' motion as a proposal "to equalize unconstitutionality by requiring the City to share the burden of impermissible overcrowding with the State. The remedy does not lie in equalizing unconstitutionality but in eliminating it." Id.

In March, 1983 the City-Respondents moved to modify the September 3, 1980 Order which set a cap of 1200 inmates on HDM and the June 23, 1981 Order which set a limit of 50 detainees per dormitory in the Anna M. Kross Correctional

Facility ("AMKC"), which had become the designation of C-71 and C-95, the former annexes to HDM. This motion sought to make permanent the temporary increases in the detainee populations at these facilities which the City-Respondents had sought --and the District Court had granted -- from October, 1982 through January, 1983. During a two week hearing in March and April, 1983 to determine whether conditions in HDM and AMKC had changed sufficiently since the entry of the earlier orders to justify their permanent modification, the District Court witnessed and documented serious violations at both facilities with respect to numerous areas of the Consent Judgments. Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983). In addition, the Court found serious deficiencies in medical care, fire safety, visiting facilities and personal safety at both facilities. After reviewing the record, the District Court noted that it agreed "with every professional and public body which has studied these institutions since the commencement of this litigation that there is a limit to the number of inmates that these facilities can house in a constitutionally acceptable manner, and that that limit has already been reached." Id. at 685. "Accordingly, the population caps established in 1980 and 1981 are still proper and necessary to afford inmates in HDM and AMKC constitutionally adequate conditions of confinement." Id. at 689.

In September, 1983 the City-Respondents moved to require the Petitioners to accept custody of four categories of inmates whom it contended were the responsibility of the State to house. This motion was filed shortly before the

October 31 deadline fixed by the District Court for the City-Respondents once more to reduce the populations at HDM and AMKC to the levels required by the 1980 and 1981 orders. In October, the District Court ordered the Petitioners to accept custody of one category of inmates, those who were serving sentences in state prisons but whose presence was required in New York City court proceedings ("out-to-court" inmates).[6]

In March, 1984 the Petitioners moved for relief from the October, 1983 order concerning the out-to-court inmates, arguing that this Court's decision in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) ("Pennhurst II") required the vacatur of the Order since it had no basis other than state law requirements. The District Court granted the motion since the 1983 Order was not based on the Constitution but had been issued in pursuit of New York State law. See, Order of April 25, 1984. (C-3, 15)

In February, 1985 the Petitioners, relying once again on Pennhurst II, moved to vacate the August, 1981 Order which required them to accept state-ready inmates within forty-eight hours of their processing.[7] In January, 1986

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[6]The Order was, by its terms, conditional on the Petitioners' keeping open the Long Island Correctional Facility -- a facility proximate to New York City with vacant space.

[7]Inmate-Respondents submitted a letter-brief to the District Court in opposition to the Petitioners' motion. We argued that since the basis for this order was Inmate-Respondents' right to be free from unconstitutional overcrowding, the Eleventh Amendment, as interpreted in PennhurstII, did not deprive the District Court of jurisdiction to order the removal of state-ready inmates from City jails. We observed, however, that the outcome of the motion should not have an effect on the City's liability under the pre-existing remedial Orders (100-106).

the District Court granted the Petitioners' motion and held that the August, 1981 order had been based on State law, specifically § 430.20 of the Criminal Procedure Law. The District Court applied the Pennhurst II holding that a federal court may not order a state official to obey state law. The District Court acknowledged, however, that there might exist alternative federal law grounds for relief against the Petitioners that would not be barred by the Eleventh Amendment if the City could establish that "the acts or omissions of the State defendants have caused or contributed to a violation of the constitutional rights of the plaintiffs, Badgley v. Varelas, 729 F.2d 894, 901, n.8 (2d Cir. 1984)." Benjamin v. Malcolm, (31-32) (reported at 626 F. Supp. 1264).

Subsequently, on February 24, 1986 the City-Respondents moved by Order to Show Cause to join the Petitioners once again, and alleged, without reference to state law, that the Petitioners' actions prevented the City-Respondents from fulfilling their obligations to the Inmate-Respondents under the District Court's constitutionally based orders (41).[8] On March 27, 1986 the District Court ordered the Petitioners joined as parties to this litigation in order to evaluate the City's factual allegations with respect to whether the Petitioners' actions placed the City in a position of

[8]Inmate-Respondents argued to the Court that in their view the Court had jurisdiction to join the Petitioners and to order relief against the Petitioners if the facts showed that such relief was necessary to protect or effectuate the Court's Orders. Plaintiffs took no position on the merits of the City's motion for preliminary relief since it was City-Respondents who could best judge the impact of the Petitioners' conduct on the City's ability to comply with the District Court's Orders (93-99).

violating the District Court's earlier decrees (745-6). The District Court noted that

> [a]lthough the City defendants do not assert that the current number of detainees violates the existing decree, it does maintain that the situation created by the presence of the state inmates places the City eyeball to eyeball with violating the existing decree as to population limits and that the City should not be required to wait until a violation of the decree actually exists before it is granted prospective relief. 629 F. Supp. 713, 719 (S.D.N.Y. 1986)

In addition the City-Respondents alleged, and the Petitioners did not deny, that

> the presence of state inmates created serious operational problems for the City correctional facilities, affecting such areas as security, visiting, recreation, medical care, food, appropriate housing and educational programs. Id. at 717.

After receiving sworn affidavits and legal memoranda and hearing argument from counsel, the District Court granted the City-Respondents' motion for a preliminary injunction which required the Petitioners to continue to accept state-ready inmates within forty-eight hours of their processing, from the City jail (757). The District Court's joinder and preliminary injunction orders are the subject of this petition for certiorari.

On September 25, 1986 the United States Court of Appeals for the Second Circuit unanimously affirmed without modification the orders of the District Court. Benjamin v. Malcolm , 803 F.2d 46 (2d Cir. 1986).

In addition the Court should be aware of a significant development in the case which Petitioners have failed to bring to the Court's attention. On August 11, 1986

Petitioners entered into an agreement with the City-Respondents entitled "Memorandum of Understanding" to "accept custody of all [newly sentenced adult male felons] within 48 hours after all papers required by Correction Law 601(a) are in order and the appropriate state DOCS [Department of Correctional Services] authorities have been so notified by appropriate City DOC authorities." This agreement by its terms was fully implemented on September 15, 1986 and is still in effect. It does not expire until September 15, 1987 and is renewable thereafter at the option of the Petitioners and the City of New York.

This agreement essentially adopts the provisions of the District Court's injunction sub judice and adds other obligations, although the agreement purports not to constitute a settlement of the litigation. While not made part of the Joint Appendix below, this agreement was submitted by letter to the Second Circuit in advance of oral argument. A copy is appended to this Brief in Opposition. See Appendix "A."

ARGUMENT

REASONS FOR DENYING THE PETITION FOR CERTIORARI

None of the considerations governing review on certiorari warrants the grant of certiorari in this case. The decisions below are not in conflict with the applicable decisions of this Court or with those of other Circuits. In joining the Petitioners and ordering preliminary relief against them, the District Court was exercising its well-established authority to protect from interference by a third party its prior remedial orders for constitutional

violations. The District Court did not impose affirmative obligations upon the Petitioners to remedy unconstitutional conditions at the City jail. Any factual questions as to the propriety of the preliminary relief, which was entered against Petitioners to preserve the status quo, can be fully aired at a plenary trial on the merits.

I. THE ELEVENTH AMENDMENT AS INTERPRETED BY PENNHURST II DOES NOT BAR THE JOINDER OF STATE OFFICIALS FOR THE PURPOSE OF PREVENTING THEIR INTERFERENCE WITH JUDGMENTS AND ORDERS PROTECTING FEDERAL CONSTITUTIONAL RIGHTS.

Petitioners contend that the Eleventh Amendment, as interpreted by this Court in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) ("Pennhurst II"), bars federal court jurisdiction over the City-Respondents' "claim" against Petitioners because such claims are "based" on State law. Their reliance on Pennhurst II is misplaced. The claims in this case are firmly grounded in federal law. As the Petitioners concede, Petition at 15-16, and as Pennhurst II itself makes clear, that decision in no way forecloses the District Court's jurisdiction "to grant prospective relief on the basis of federal law." Id. at 105, 109 n. 17.

A. The District Court's orders were based on considerations of federal, not state law.

This case was pled as an action for violation of federal constitutional rights, under the Fourteenth Amendment and 42 U.S.C. § 1983, with federal court jurisdiction premised on 28 U.S.C. Secs. 1343(3), (4). The overcrowding question which underlies the present dispute was resolved by a judgment of unconstitutionality that was

based both on the prior stipulation of the parties and on an independent finding by the District Court.[9] Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980). To remedy the constitutional violation, the District Court ordered the City Respondents to reduce the population of HDM and entered further orders against the City Respondents regarding permissible population levels in the annex facilities. See Orders of April 13, 1981 and June 23, 1981 (unreported). The underlying finding of unconstitutionality was reiterated following a trial in the District Court's opinion of May 19, 1983, 564 F. Supp. 668 (S.D.N.Y. 1983). In the opinion presently at issue, the District Court stated once more that the population limit was "set as a result of the court's determination of a constitutional violation." (741). Benjamin v. Malcolm, 629 F. Supp. 713, 718 (S.D.N.Y. 1986).

The joinder of the Petitioners was and is intended to protect orders designed to ensure compliance with the federal constitutional rights of city jail inmates, as the District Court has made absolutely clear.[10] In its December

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[9]Claims regarding other unconstitutional conditions of confinement, conditions which are directly affected by overcrowding and the presence of large numbers of state inmates in the City's jails, were resolved by separate consent judgments. See Statement of Case at 3-4.

[10]The District Court's opinion of January 30, 1986, 626 F. Supp. 1264 (S.D.N.Y. 1986), vacating its 1981 Order under Pennhurst II because it was based on State law, is not to the contrary. The District Court had originally relied on State law pursuant to the familiar "prudent jurisprudential approach of not deciding constitutional questions when an adequate state law basis for relief exists." (25). However, as noted below, the controversy before the District Court was always ultimately one of constitutional magnitude. The motivating force behind these proceedings is the underlying constitutional violation (which resulted in the entry of the relevant orders and which will recur if the orders are not followed). After Pennhurst II abolished its jurisdiction over the state law claim, on a proper showing by the City (fn. cont'd next pg)

22, 1981 order denying the Petitioners' initial request to be relieved of their obligation to accept state-ready prisoners, the District Court observed that the presence of a backlog of state-ready prisoners would also jeopardize efforts to achieve constitutionally acceptable jails in New York City. Benjamin v. Malcolm, 528 F. Supp. 925, 930 (S.D.N.Y. 1981). The District Court at that time also found that the removal of state-readies was necessary to preserve its constitutionally based jail population limit, a limit which was imposed "in order to render conditions at HDM constitutionally permissible." Id. (emphasis supplied).

Again, in the present opinion, the District Court repeatedly referred to the constitutional basis of the controversy. It stated that "the 'claim' to be examined . . . is the City's assertion that the State defendants must be

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10 (cont'd)
Respondents the District Court reached the constitutional question as to which its jurisdiction was never in question, and entered similar relief to protect its remedy for the constitutional violation.

This approach was consistent with the approach adopted by this Court in Pennhurst II. In Pennhurst II the Court remanded the case to determine whether the state officials' conduct, the same conduct that formed the basis of the state law claim, violated federal law. 465 U.S. 89, 125. Subsequent to Pennhurst II, in Smith v. Robinson, 468 U.S. 992 (1984), this Court approved, under Pennhurst II principles, the First Circuit's treatment of an injunction, issued before Pennhurst II and based on a state law claim, as relief "essentially awarded under the EHA", the Federal Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., since the action was actually a challenge to a petitioners' "construction of state law on the basis of [plaintiffs'] rights under the EHA." Smith, 468 U.S. 992, 1002 fn.6.

By vacating its original injunction precisely because it was issued to enforce state law, the District Court followed the example of this Court in Pennhurst II. 626 F. Supp. 1264 (S.D.N.Y. 1986). The District Court then separately considered whether alternative federal law grounds could support the relief sought. Only when the District Court was persuaded that such federal grounds existed did it re-issue its injunction against the Petitioners. 629 F. Supp. 713 (S.D.N.Y. 1986)

joined in order to assure full compliance with the existing decree which assures the plaintiffs' protection of their constitutional rights." 629 F. Supp. 713, 715 (emphasis supplied); see also id. at 716. The District Court further observed that "the judgment here does rest on a constitutional violation," id. at 718 (emphasis in original).

The Court of Appeals recognized the federal law basis for the District Court's injunction and grounded its affirmance squarely on that point.[11] Rejecting the Petitioners' Pennhurst II argument that they were being ordered to obey state law, Judge Mansfield wrote

> this contention ignores the district court's finding that the refusal of state officials promptly to accept state-ready prisoners also violates a federal interest in vindicating the already adjudicated constitutional rights of prisoners housed at the City's [House of Detention for Men]. Benjamin v. Malcolm 803 F.2d 46, 51 (2d Cir. 1986)

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[11] Petitioners point to the Court of Appeals' statement that "State officials have a constitutional responsibility for conditions of confinement in local facilities" and argue that it was a "holding" which in Petitioners' words, "could be read to allow a locality to ask a federal court to order state officials to take whatever action is necessary to rectify unconstitutional conditions in local jails." Petition at 12.

But the Court of Appeals "held" no such thing. In response to the Petitioners' farfetched claim that they have no responsibility except under state law even to accept custody of convicted state felons, the Court of Appeals merely observed, in dicta, that a state always bears a federal constitutional responsibility for the conditions of confinement of its own prisoners. 803 F.2d 46, 51 (2d Cir. 1986). The Court of Appeals did not purport to require the Petitioners in this case to undertake affirmative measures to implement the remedial orders of this case. No such obligations have ever been sought or imposed upon the Petitioners. All the Petitioners have been instructed to do is avoid interfering with the City's efforts to comply with the District Court's remedial orders.

Under these circumstances, Petitioners' claim that there is no federal law basis for their joinder simply misreads the decade-long record of the case.

II. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED THE SAME MATTER.

The Court of Appeals and the District Court held that the Eleventh Amendment does not prohibit a federal court from granting injunctive relief to require state officials to remove state prisoners from local jails so as to avoid unconstitutional overcrowding. Simply because these holdings may also result in Petitioners' adherence to state law commands, they do not, by virtue of that coincidence, run afoul of the Eleventh Amendment as interpreted by Pennhurst II.

Every Court of Appeals since Pennhurst II that has considered the question of whether state officials can be ordered to conform their conduct to state law to vindicate a plaintiffs' federal statutory or constitutional rights has been in accord. See David D. v. Dartmouth School Committee; 775 F.2d 411 (1st Cir. 1985); Geis v. Board of Education, 774 F.2d 575 (3rd Cir. 1985); Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), cert. denied, Cohen v. Betson, ____U.S.____, 105 S.Ct. 2126, (1985); Tate v. Frey, 735 F.2d 986 (6th Cir. 1984); and Students of California School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984) cert. granted, vacated as moot, 471 U.S. ___, 105 S.Ct. 1820 (1985), remanded, 760 F.2d 238 (9th Cir. 1985).

With the exception of Tate v. Frey, in each of these cases state law had been incorporated by reference into federal funding statutes. By not following state laws state officials had also violated federal law. In order to comply with federal law, state officials were ordered by the federal courts to conform their conduct to various explicit state law requirements. The various circuit courts have viewed this as consistent with Pennhurst II.

In Tate v. Frey, 735 F.2d 986 (6th Cir. 1984), the Sixth Circuit was faced with facts virtually identical to the case at bar - a failure by state corrections officials to transfer convicted state felons to state prisons in a timely manner, thus creating unconstitutional overcrowding in local jails. In Tate, as here, the state officials also were arguably violating state laws that required them to accept actual custody of convicted felons. The Sixth Circuit rejected the state officials' argument that such state law obligations immunized them under the Eleventh Amendment from federal injunctive relief designed to remedy constitutional violations in local jails. The Sixth Circuit observed that although state law was the source of the state's custodial obligations, the basis for the injunction was the federal constitutional limitations on inhumane conditions of confinement. The injunction was upheld despite the fact that Kentucky corrections officials were also under a federal court order in another case to eliminate overcrowding in their state prisons. Cf., Petition at 8 and 12.

The Sixth Circuit decided the issue similarly in Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985) cert. denied ___ U.S. ____, 106 S.Ct. 3481 (1985), a case concerning the due process right of a Michigan prisoner to receive books from sources other than publishers. A Michigan law created a cognizable federal due process property

interest in the receipt of such books by prisoners that was violated by prison officials' practices. The Sixth Circuit, again rejecting Pennhurst II arguments, stated

> Although Spruytte's claim requires us to consider issues of state law, it does not follow that his claim is barred by Pennhurst. Spruytte's complaint alleges a violation of his federal constitutional rights. We decline to endorse the proposition that officials may undermine federal court authority by violating state as well as federal law.

Id. at 514 (emphasis in original).

Thus, the role of state law in this case does not bring it within the holding of Pennhurst II.

> III. JURISDICTION TO ENJOIN INTERFERENCE BY THIRD PARTIES WITH THE DISTRICT COURT'S ORDERS IS AVAILABLE UNDER THE ALL WRITS ACT BASED ON THE DISTRICT COURT'S ORIGINAL JURISDICTION OVER THE CONTROVERSY.

The District Court's action is properly viewed and is supportable as authorized by the All Writs Act, 28 U.S.C. Sec. 1651(a), or as an exercise of ancillary jurisdiction.[12] Jurisdiction is based on the Court's original jurisdiction over the case, and at the post-judgment stage it is not necessary to return to square one and assert a new federal constitutional claim, as Petitioners appear to believe.[13]

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[12] In some cases, the distinction between these two sources of judicial power is blurred. See, e.g., In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985) ("When a federal court has jurisdiction over its case in chief . . . the All Writs Act grants it ancillary jurisdiction to issue writs 'necessary or appropriate in aid of' that jurisdiction.") Since the result in this case is the same under either theory, it is not necessary to resolve this distinction.

[13] It is absurdly impractical to suggest, as Petitioners appear to, that a party who interferes with a federal court judgment is thereby entitled to relitigate the underlying constitutional claim. See Petition at 18-19. To argue that the judgment can only be enforced if the constitutional violation remains--that is, if the judgment has completely failed in its purpose--makes no sense. Nonetheless the Court of Appeals' decision provides the Petitioners at the hearing on a permanent injunction "the opportunity to address whether its activities actually contributed to the adjudicated unconstitutional conditions and to offer evidence that such unconstitutional conditions do not exist." 803 F.2d 46, 54 (2d Cir. 1986).

Petition at 16. In either case, joinder of a third party to prevent that party's interference with a judgment of the court is proper.

Under the All Writs Act, as long as there is jurisdiction over the case in chief, In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985), the Act grants the district courts authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. Sec. 1651(a). This Court has explicitly observed that one function of the Act is to permit federal courts to issue injunctions that are necessary "to aid in the performance of its duties... to achieve the ends of justice entrusted to it." Adams v. U.S. ex. rel. McCann, 317 U.S. 269, 273 (1974); U.S. v. New York Telephone Co., 434 U.S. 159, 175 (1977); Baker v. Gotz, 415 F. Supp. 1243 (D. Del. 1976), aff'd, 546 F.2d 415 (3rd Cir. 1976). See also, Ward v. Pennsylvania New York Central Transportation Co., 456 F.2d 1046, 1048 (2d Cir. 1972) ("to protect or effectuate its judgments").[14]

[14]The Petitioners' argument, Petition at 21, that use of the All Writs Act is precluded here by the holding in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. _____, (1985), is completely off the mark. There, the Court held that since provisions of the habeas corpus statutes specifically addressed the issue of writs of habeas corpus ad testificandum, the courts could not use the Act to support different procedures simply because the statutory procedures appeared "incovenient or less appropriate." Id. at _____. To argue from this that the availability of the Judiciary Act precludes the use of the All Writs Act is absurd. See Petition at 20-21. Every federal case is jurisdictionally based on the Judiciary Act or some other statutory basis of jurisdiction. Petitioners' position, if accepted, would virtually nullify the All Writs Act and would require a new lawsuit to be started in every instance where the All Writs Act is now available.

Injunctions under the Act have historically been granted in order to prevent third parties, including state officials, who were not defendants at the time of the original judgment, from taking actions that would interfere with the federal court's prior orders, see U.S. v. George C. Wallace, 218 F. Supp. 290 (D.Ala. 1963) (State Governor enjoined under All Writs Act from preventing enrollment of Negro students in state university, as previously ordered in another case); Valley v. Rapides Parish School Board, 646 F.2d 925, modified on other grounds, 653 F.2d 941 (5th Cir. 1981), cert. denied 455 U.S. 939 (1982) (State judge and sheriff enjoined under All Writs Act from obstructing school desegregation order: "The District Court had broad powers under the All Writs Act to enjoin third parties, including state courts, from interfering with its desegregation orders" (emphasis in original); Bullock v. U.S., 265 F.2d 683 (6th Cir. 1959), cert. denied 360 U.S. 909 (1959) (third party private citizens, members of white supremacy group, enjoined under All Writs Act on request of defendant school officials from acting to prevent school officials' compliance with desegregation order), and even to prevent federal judges from failing to implement the desegregation rulings of this Court, Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963), cert. denied 376 U.S. 908 (1964); Davis v. Board of School Commissioners of Mobile County, Ala., 322 F.2d 780 (5th Cir. 1963) cert. denied 375 U.S. 894 (1963), reh. denied 376 U.S. 928 (1964); Stell v. Savannah-Chatham County Board of Education, 318 F.2d 425 (5th Cir. 1963).

As this Court has indicated,

> [t]he power conferred by the Act extends, under appropriate circumstances, to persons, who though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . .
>
> United States v. New York Telephone Co., 434 U.S. 159, 174 (1977).

See also In re Baldwin-United Corp., 770 F.2d at 335-36; United States v. State of Washington, 459 F. Supp. 1020, 1029-31 n.3 (W.D. Wash. 1978) and cases cited therein (discussing a similar application of the Court's power to protect and effectuate its judgments against State courts under the Anti-injunction Act and the All Writs Act).

Ancillary jurisdiction may properly be invoked against a third party who obstructs implementation of a judgment, since this jurisdiction is

> . . . based on the principle that the federal courts have power to take such action as is necessary properly to carry out or enforce their judgments on matters as to which they have original jurisdiction. See 13 Wright & Miller, Fed. Prac. & Proc. Sec. 3523, at 60; Dugas v. American Surety Co. of N.Y., 300 U.S. 414, 57 S.Ct. 515, 81 L.Ed. 720 (1937); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338, 65 L.Ed. 673 (1921); Crosby v. Mills, 413 F.2d 1273 (10th Cir. 1969). While these cases involved relitigation by the parties or their successors to the original judgment, a number of cases have held that ancillary jurisdiction to take acts to effectuate a prior judgment exists over new parties who are interfering with the decree. In Board of Ed. v. York, 429 F.2d 66 (10th Cir.), cert. denied, 401 U.S. 954, 91 S.Ct. 968, 28 L.Ed. 2d 237 (1970), the Board of Education, which was ordered to change school boundaries in a desegregation case, was able to enjoin a couple from trying to send their child to school across the new boundaries. In Castro v. Beecher, 386 F. Supp. 1281

(D. Mass. 1975), the court exercised ancillary jurisdiction over new defendants in an action by the plaintiffs in the underlying case to enforce the judgment rendered therein. The court in Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1, 6 (E.D.Mo. 1967), aff'd, 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed. 2d 779 (1968), stated that the rule whereby the courts of the United States have the power "to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with . . . applies whether or not the person charged with the violation of the judgment or decree was originally a party defendant to the action."

New York State Association for Retarded Children, Inc. v. Carey (NYSARC), 438 F. Supp. 440, 446 (E.D.N.Y. 1977).

Both the District Court and the Court of Appeals recognized the jurisdictional premises for use of the All Writs Act and appropriately exercised the power conferred by the Act.[15]

IV THE CITY RESPONDENTS HAVE STANDING TO JOIN THE PETITIONERS BASED ON THE CONSEQUENCES FOR THEM OF THE PETITIONERS' CONDUCT AND THEIR OBLIGATIONS UNDER THE ORDERS OF THE DISTRICT COURT.

In an apparent effort to evade the clearly federal nature of the present controversy, Petitioners have argued

[15]It is true that the Act may not be used to impose obligations upon an innocent defendant that are equivalent to the kind of remedy that a liable party assumes after an adjudication of fault. General Buildings Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) (Court refused to sanction extensive affirmative relief against parties found not liable for discrimination, but left open possibility that they might still be subjected to less sweeping orders if necessary to afford complete relief to the plaintiffs). However, no such obligations are sought against the Petitioners here. There is no order directing them to remedy the unconstitutional conditions in City jails. They are simply being told to stop interfering with the City Respondents' efforts to comply with a remedy for unconstituitonal wrongs. To put it bluntly, the Petitioners are in the case for the sole purpose of making sure that they stay out of the City's way.

that the City-Respondents lack standing to press their claim against them. Petition at 23-25.

As a constitutional matter, standing requires only that a party demonstrate "injury in fact" sufficient to give it a personal stake in the controversy. See Warth v. Seldin, 422 U.S. 490, 499 (1975); Singleton v. Wulff, 428 U.S. 106, 112 (1976); Craig v. Boren, 429 U.S. 190, 194 (1976). In addition, there is a prudential component of standing that involves a judgment by the courts as to whether the party is an appropriate one to litigate the particular claim that is asserted. Singleton, 428 U.S. at 113. The City-Respondents meet these tests. There is no question that they have alleged injury in fact, and courts have repeatedly found standing appropriate in similar situations.

As to injury, the District Court and Court of Appeals noted that the City-Respondents, as the parties bound by the main judgment in the case, are subject to contempt sanctions for noncompliance. 803 F.2d 46, 54 and 629 F. Supp. 713, 715. Cf. Badgley v. Santacroce, 800 F.2d 33 (2d Cir. 1986) (Badgley II) (contempt sanctions imposed). Petitioners' opinion that the City-Respondents would have a good faith defense based on Petitioners' obstruction of their efforts hardly disposes of the question. Petition at 24. That is particularly true since it will not be impossible in the strict sense for the City-Respondents to comply, since release of lawfully committed inmates, "closing the front door" of the jails, and enormous expenditures of money are, among others, ways in which the City-Respondents could comply if they had to also house state ready prisoners

indefinitely.[16] See e.g. Badgley v. Varelas, 729 F.2d 894, 903 (2d Cir. 1984) (Badgley I).

Even if it is possible in theory for the City to avoid contempt sanctions, the consequences of the state-ready backup are sufficiently serious that they more than suffice to meet the "injury in fact" test. To accommodate the high-security State population of convicted felons, it has been necessary to move groups of City inmates from jail to jail, resulting in a population of males at the women's jail and adults in an adolescent facility. See Affidavit of Jacqueline McMickens, sworn to February 20, 1986, at ¶¶ 16-23. (51-54). Ultimately, the consequences of continued security compromises, crowding, and inadequate delivery of services may be large-scale violence, danger and injury to inmates and staff--as has been the case in the past.[17] 803

[16]As the District Court has noted, even the City-Respondents have not argued that they will be freed of their obligations because of the burdens of housing state prisoners. Benjamin v. Malcolm, 495 F. Supp. 1357, 1362 (S.D.N.Y. 1980). Moreover, Petitioners' apparent belief that the "fiscal" aspect of the City's injury is insufficient to confer standing is simply wrong. Petition at 23. Economic injury has repeatedly been found to confer standing to litigate constitutional claims. See e.g., Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. at 112; Rogers v. Brockette, 588 F.2d 1057, 1060-61 (5th Cir. 1979); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972).

[17]The danger of violence posed by jail overcrowding was thoroughly documented in the initial proceedings leading to the HDM population limit. The New York City Board of Correction found in 1975 that overcrowding "creat[ed] an environment that is in a perpetual state of emergency" and was a major cause of increased tensions. The District Court observed, "The Board's analysis was proven too truly correct when in the fall of 1975, a major riot occurred at HDM causing millions of dollars of physical damage and endangering the lives of several correction officers who were taken as hostage." Benjamin v. Malcolm, 495 F. Supp. 1357, 1360 (S.D.N.Y. 1980). The Commissioner of Correction subsequently cited overcrowding as a major causative factor in the riot. Similarly, the New York State Commission of Correction found that "racial tensions and interpersonal problems begin to develop" at higher population levels, a conclusion concurred in by the Warden of HDM. Id.

F.2d 46, 54. To claim that the City-Respondents lack the requisite injury to state a case or controversy under Article III is to deny reality.

Moveover, wholly apart from sanctions, responsible public officials have a strong and legitimate interest in meeting their obligations under federal court orders intended to vindicate constitutional rights. Public officials in similar situations have repeatedly been found to have standing to challenge the actions of other governmental bodies.

In Board of Education v. Allen, 392 U.S. 236 (1968), where local school officials challenged a state statute on Establishment Clause grounds, this Court observed,

> . . . . Appellants have taken an oath to support the United States Constitution. Believing Sec. 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step--refusal to comply with Sec. 701--that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.
>
> Id. at 241, n. 5.

In Regents of University of Minnesota v. National Collegiate Athletics Assn., 560 F.2d 352 (8th Cir. 1977), state educational officials were found to have standing to challenge a statute they believed would lead to violation of their students' due process rights. Standing was found based on the officials' own rights. The court held that "persons charged with the performance of a constitutional duty have, in their personal capacity, a correlative right to be free from interference with the performance of that duty." Id. at 363. Similarly, in Akron Board of Education

v. State Board of Education of Ohio, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974), local school officials were found to have standing to challenge action by state education officials requiring the local officials to perform acts "leading in the direction of segregation of its school system. Such conduct would place the Board and its members and its Superintendent in the position of violating the Fourteenth Amendment to the United States Constitution." Id. at 1290.[18] Accord, Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956)[19] and Kelley v.

[18]Some of the other factors cited in the Regents and Akron cases are similar to factors present here. Both cases cite the "identity of interests" between the plaintiff officials and the students involved; here, there is certainly an identity of interests between the class benefited by a judgment and the officials who are seeking an order that will assist them in complying with the judgment. The "loss of territory and tax funds" at stake in the Akron case are parallel to the encumbering of the City defendants' resources and the encroachment on their physical plant and administrative autonomy occasioned by having hundreds of State prisoners forced on them. Also, the Akron officials could have been subjected to "a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages under the Civil Rights Act." 490 F.2d at 1290. The City Respondents are, of course, subject to similar risks.

[19]The Fifth Circuit has made this point eloquently in a different context, observing that

> . . . . the plaintiffs were found to have a constitutional right to attend an integrated school. The defendant school board had a corresponding constitutional obligation to provide them with integrated schools and a right to be free from interference with the performance of that duty. . . . Disruption of the orderly operation of the school system . . . would thus negate the plaintiffs' constitutional right and the defendants' constitutional duty.
>
> United States v. Hall, 472 F.2d 261, 265 (5th Cir. 1972) (emphasis supplied).

Metropolitan Board of Education, 372 F. Supp. 528 (M.D. Tenn. 1973) (court joined as third-party defendants federal officials, since defendant school officials had standing to challenge the federal officials' policy of withholding appropriated funds required to implement a school desegregation order; the Court rejected the claim that only the original plaintiffs could join the third-party defendants and assert the requirements of the order).

Clearly, then, the City-Respondents have standing to assert their claim against Petitioners based on their obligations under the outstanding orders in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for A Writ of Certiorari.

Dated: New York, New York
February 12, 1987

Respectfully submitted,

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APPENDIX A

Memorandum of Understanding

This Memorandum represents the understanding and agreement among and between Lawrence T. Kurlander, the Director of Criminal Justice, Commissioner Ramon J. Rodriguez, Chairman of the Division of Parole, and Commissioner Thomas A. Coughlin III, of the Department of Correctional Services (DOCS) on behalf of the State of New York ("State"), and Kevin B. Frawley, Coordinator of Criminal Justice and Commissioner Jacqueline McMickens, Commissioner of the Department of Correction ("DOC"), on behalf of the City of New York, ("City"), governing the custody and transfer of certain categories of prisoners who are detained in State DOCS and City DOC facilities.

Applicable Statutes

Negotiations between the State and City leading to this agreement have focused on two categories of adult male prisoners: detainees in DOC custody newly-sentenced to state prison and ready for transfer; and parole and conditional release ("Parole Violators") lodged by the Division of Parole with the City pursuant to arrest on local criminal charges and with the State pursuant to violations of the rules of their release agreements. These constitute the vast majority of prisoners affected by the terms of this agreement.

Numerous statutory provisions in the law of the State of New York bear upon the rights and obligations of the State and the City with respect to the custody of prisoners. Three in particular apply here and these have been the cause of disagreements and extensive litigation in recent years.

Criminal Procedure Law § 430.20, subdivisions (1) and (2), provides that defendants sentenced to indeterminate sentences of imprisonment must be committed forthwith to the custody of the state Department of Correctional Services;

Executive Law § 259-i, subdivision 3(a) provides that where a warrant has been issued for the retaking of an alleged parole violator, the officer executing such warrant is required to have the alleged violator detained in a local correctional facility, that such a warrant constitutes sufficient authority for the local correctional official to hold the person named therein, and;

Executive Law § 259-i, subdivision 3(b) provides that persons taken into custody for violation of the conditions of parole or conditional release shall, insofar as practicable, be incarcerated in the county or city in which the arrest occurred.

The State and the City are currently litigating the meaning of the provisions cited above in state court in Davis v. Coughlin, McMickens and Rodriguez. In addition, the State and the City are litigating the authority of the federal court to define the provisions of the above cited state statutes in Benjamin v. Malcolm. This agreement does not constitute a settlement of the above cited litigation. By accepting the terms and conditions expressed in this agreement, the State and City have not adopted specific interpretations of State law, rather they have agreed to proceed, despite their differences in a spirit of compromise and cooperation, within the context of the existing litigation.

In 1980, the City unilaterally stopped accepting alleged rules parole violators. The State continues to hold alleged parole violators in NYC, at the Queensboro Correctional Facility. Parolees arrested on local criminal charges are held by DOC during the pendency of the criminal case and, once the underlying criminal charge is disposed of, DOC maintains custody until the parole violation is finally adjudicated.

In 1981, the State was ordered by the federal District Court to transfer adult male inmates sentenced to state prison within 48 hours after they are ready to be transferred, that is, when all required paperwork and processing has been completed. Though temporarily stayed early this year, this order still remains in effect. Both the State and the City agree that the results of the actions taken in 1980 and 1981 have been unsatisfactory for both correctional systems and for the parole system.

In June 1986, the Appellate Division of the Second Department in Nassau County v. Cuomo ruled that local correctional facilities have an absolute obligation to accept for lodging, in temporary detention, alleged parole violators presented on a warrant issued pursuant to Executive Law §259-i (3)(a); and that State DOCS is obligated to take custody of new commitments within 14 days of sentencing unless exigent circumstances require a further limited delay, pursuant to CPL 430.20. Though temporarily stayed, with respect to enforcement against Nassau County, this decision is still binding upon all other political subdivisions located within the Second Department.

Purpose and Provisions

In order to improve the efficient administration of their respective correctional systems, the State and the City recognize the need to fashion and to adopt appropriate measures through mutual cooperation and, where possible, without recourse to litigation; toward that end, the State and the City hereby agree to implement the following five provisions:

1) Newly-sentenced adult males: Pursuant to Federal court order, State DOCS will accept custody of all such prisoners within 48 hours after all papers required by Correction Law 601(a) are in order and the appropriate State DOCS authorities have been so notified by appropriate City DOC authorities;

2) Newly-sentenced adult and adolescent females and adolescent male inmates: State DOCS will accept custody of these prisoners within 14 days after all papers required by Correction Law § 601 (a) are in order and the appropriate State DOCS authorities have been so notified by appropriate City DOC authorities; provided however, if space is available, DOCS will accept inmates in this category who have been ready for transfer for less than the maximum 14 days.

3) All categories of Parole Violators: City will accept custody of all rules parole violators from arrest until 14 days after the completed final parole violation hearing, at which point they will be transferred to State DOCS and responsibility for them will be assumed by State DOCS.

4) Out to court inmates with adjournments: City DOC shall pick up out to court inmates from State DOCS facilities who have court appearances in New York City and shall retain custody of these inmates for so long as they have adjournments of 5 days or less.

5) Out to court inmates whose court orders have been satisfied: DOCS will accept custody of adult male inmates who have been sentenced within 48 hours as per paragraph 1 above. DOCS will accept custody of all other inmates who have satisfied court orders within 14 days.

For all categories of prisoners transported to State custody, the City will be responsible for delivering such prisoners to DOCS's Downstate, Elmira, and Bedford HIlls facilities.

Implementation

This memorandum of understanding and agreement shall take effect on the 15th day of August, 1986. Beginning on that date, the City DOC will start accepting all technical parole violators lodged with City DOC by the Division of Parole. Also on August 15th the State DOCS will begin a phased transfer to state facilities of all adult male newly-sentenced state-ready prisoners in a process designed to reduce the population of this category of prisoners to those awaiting transfer no more than 48 hours. Concurrently, the State DOCS will accept custody of all categories of rules parole violators who are in DOC custody more than 14 days after completion of the final parole violation hearing. Reductions of both newly-sentenced and parole violator categories shall be completed by September 15, 1986. Further, all situations involving the custody and transfer of the categories of prisoners discussed herein shall be fully implemented by September 15, 1986.

This agreement shall remain binding upon the State and the City for one year from the implementation date; thereafter, it shall be renewable at the option of the State and the City.

State of New York

Lawrence T. Kurlander
Director of Criminal Justice

Thomas A. Coughlin, III
Commissioner
Department of Correctional Services

Ramon J. Rodriguez
Chairman
Division of Parole

City of New York

Kevin B. Frawley
Coordinator of Criminal Justic

Jaqueline McMickens
Commissioner
Department of Correction

by:

Martin Montiero
Acting Commissioner
Department of Correction

DATED: August 11, 1986

AFFIDAVIT OF SERVICE

COUNTY OF NEW YORK)
) SS.:
STATE OF NEW YORK)

I, THEODORE H. KATZ, being first duly sworn depose and say that the foregoing "Inmate-Respondents Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit" was sent by regular process of the United States Mail, first class, postage pre-paid by delivering it to a United States Post Office on February 12, 1987 and addressed to:

Clerk
Supreme Court of the United States
U.S. Supreme Court Building
Washington, D.C. 20543

Copies of the same were served in the same manner upon attorneys for the Petitioners and City Respondents.

Theodore H. Katz
THEODORE H. KATZ

Sworn to and subscribed before me this
12th day of February, 1987

Dori A. Lewis
Notary Public

DORI A. LEWIS - NOTARY PUBLIC
State of N.Y., No. 31-462 6437 New York County
My Commission Expires March 30, 19 87